UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. 1324a Proceeding
v.	)	OCAHO Case No. 97A00069
XELA RESTAURANT ASSOCIATES, INC. d/b/a RUSTY NAIL, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING COMPLAINANT S MOTION
AND ENTERING DEFAULT JUDGMENT
(June 30, 1997)

I. PROCEDURAL HISTORY

Xela Restaurant Associates, Inc. d/b/a Rusty Nail (Respondent) requested a hearing in this matter before an Administrative Law Judge, through its counsel, Steven Rothfeld, on July 25, 1997, following a July 3, 1996, service of a Notice of Intent to Fine (NIF). On February 12, 1997, the United States of America (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The NIF and the Request for Hearing were attached to the Complaint.

The Complaint contains four Counts. Count I charges Respondent with failure to prepare and/or make available for inspection the employment eligibility verification form (Form I-9) for each of twenty-six named individuals. The civil money penalty assessed for Count I is $9,880, at $380 per violation. Count II of the Complaint charges Respondent with failure to ensure that seven named employees completed section 1 of the I-9 Form and also charges Respondent with a failure to complete section 2 of Form I-9. The civil money penalty assessed for Count II is $2,650, including two violations at $450 and five violations at $350. Count III of the Complaint charges Respondent with failure to properly complete section 2 of the I-9 Form for nine employees and the civil money penalty assessed for Count III is $2,930, including one violation at $370 and eight violations at $320. Lastly, Count IV of the Complaint charges Respondent with failure to ensure that nine employees properly completed section 1 of Form I-9. The civil money penalty assessed for Count IV is $2,950, including five violations at $350 and four violations at $300. Thus, in its Prayer for Relief, the Immigration and Naturalization Service (INS) requests an order directing Respondent to pay a total civil money penalty of $18,410.

OCAHO served the Complaint, Notice of Hearing and a copy of the OCAHO Rules of Practice and Procedure on Respondent. The return receipt card indicates that Respondent received the Complaint on February 22, 1997. OCAHO also served the above on Respondent s counsel, Steven Rothfeld, and the return receipt card indicates he received the Complaint on March 28, 1997. The Notice of Hearing specifically stated that the Respondent must file an Answer within thirty days after receipt of the Complaint and that failure to file an Answer may be deemed to constitute a waiver of the right to appear and contest the allegations of the Complaint. The Notice of Hearing further stated that if Respondent failed to file an Answer to the Complaint, the Administrative Law Judge may enter a default judgment and grant all appropriate relief.

On May 27, 1997, I issued a Notice of Default, noting that no Answer to the Complaint had been received and that the Rules of Practice require such an Answer. The Notice specifically warned that if an Answer was not served, a default judgment might be entered. Service of the Notice of Default was attempted on both Respondent and Respondent s Counsel. A return receipt card indicates that Respondent s counsel received the Notice of Default on June 6, 1997. The Notice of Default sent to Respondent was returned to OCAHO on June 11, 1997. Attached to the returned Notice was a note stating that Respondent had gone out of business and was no longer located at the address indicated on the envelope. Though Respondent did not receive a copy of the Notice of Default, service upon Respondent s counsel was effective to constitute notice to Respondent. 28 C.F.R. 68.3(a); see United States v. Manuel Medina, Jr. et al., 3 OCAHO 485 (1993).

On May 28,1997, Complainant served a Motion for Default Judgment, requesting that I enter a default judgment because no Answer to the Complaint had been filed as required by 28 C.F.R. 68.9(b). On June 6, 1997, I issued an Order Noting Default and Requiring Respondent to Show Cause Why Complainant s Motion for Default Judgment Should Not Be Granted. This Show Cause Order extended the time in which Respondent could file an Answer. The Show Cause Order required Respondent to file an Answer within fifteen days after the issuance date of the order (or by June 23, 1997) and to show good cause why the Answer was late. The Show Cause Order further stated that if Respondent failed to comply with the Order, I might grant Complainant s Motion, enter judgment against Respondent, and assess a civil penalty without any further proceedings. Despite these warnings and extensions, as of this date, Respondent has not filed an Answer to the Complaint or responded to the Complainant s Motion, the Notice of Default, or the Show Cause Order.

II. DISCUSSION

OCAHO Rules of Practice and Procedure require a Respondent to serve an Answer to the Complaint and provide that failure to do so shall constitute a default. 28 C.F.R. 68.9. The Rules also provide that a party shall be deemed to have abandoned a request for hearing if the party or his representative fails to respond to orders issued by the Administrative Law Judge. 28 C.F.R. 68.37(b). Failure to respond to a Notice of Default invites a judgment of default, especially were, as here, it appears that Respondent and his counsel have ignored the Court s order and de facto have abandoned the request for a hearing. See United States v. Iniguez-Casillas, 6 OCAHO 870 (1996),

1996 WL 492317; United States v. Broker s Furniture and Mfg. Inc., 5 OCAHO 789 (1995), 1995 WL 706038; United States v. Hosung Cleaning Corp., 4 OCAHO 681 (1994), 1994 WL 645787. Even in cases where they appeared without counsel, parties that failed to obey Judges orders were found to have abandoned their requests for hearing or to have abandoned their Complaints. United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994), 1994 WL 526369; Holquin v. Dona Ana Fashions, 4 OCAHO 605 (1994), 1994 WL 269357; Brooks v. Watts Window World, 3 OCAHO 570 (1993), 1993 WL 566122; Speakman v. Rehabilitation Hosp. of South Texas, 3 OCAHO 476 (1992), 1992 WL 535634 ; Palancz v. Cedars Medical Ctr., 3 OCAHO 443 (1992), 1992 WL 535580.

Here, Respondent is represented by counsel, who has been served with the Complaint, Complainant s Motion for Default, the Notice of Default, and the Order Noting Default and Requiring Respondent to Show Cause Why Complainant s Motion for Default Judgment Should Not Be Granted. If Respondent s counsel desires to withdraw from representation in this matter he must request permission from the Administrative Law Judge in the form of a written motion. See 28 C.F.R. 68.33(c), 68.6(a), and 68.11(a). To date, Respondent s counsel has neither filed a motion requesting to withdraw nor any other document indicating that he does not represent the Respondent. Since counsel has entered an appearance in this case, he is responsible to his client and the Court for filing an Answer to the Complaint, for responding to the opposing party s motion, and for complying with the Judge s orders. He has failed to do all three.

Given the failure by Respondent and its Counsel to Answer the Complaint, or take any other action to defend Respondent s interests in this matter, I must conclude that Respondent has abandoned its Request for Hearing. Respondent is in default not only for failure to Answer the Complaint, but also for failure to respond to the Notice of Default and the Show Cause Order. See 28 C.F.R. 68.9(b) and 68.37(b)(1).

III. FINDINGS, CONCLUSIONS AND ORDER

1. Complainant s Motion for Entry of a Default Judgment is granted;

2. I find that each and every paragraph of the Complaint, including the prayer for relief, has been admitted by Respondent by its failure to answer the Complaint;

3. Respondent shall pay a civil money penalty of $18,410;

4. The notice of hearing in this case is canceled.

ROBERT L. BARTON, JR.

ADMINISTRATIVE LAW JUDGE

NOTICE REGARDING RIGHT TO APPEAL

Pursuant to the Rule of Practice, 28 C.F.R. 68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review together with supporting arguments. The CAHO may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become final within thirty days of the decision and order

unless the CAHO modifies or vacates the decision and order. See 8 U.S.C. 1324a(e)(7) and 28 C.F.R. 68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a party adversely affected by a final order issued by the Judge or the CAHO may, within 45 days after the date of the final order, file a petition for review in the United States Court of Appeals for the appropriate circuit for the review of this order. See 8 U.S.C. 1324a(e)(8).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 1997, I have served the foregoing Order Granting

Complainant s Motion and Entering Default Judgment on the following persons at the addresses shown, by first class mail, unless otherwise indicated:

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(Counsel for Complainant)

Xela Restaurant Associates, Inc.
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(Respondent)

Steve Rothfeld, Esq.
Rothfeld, Rothfeld and Cox
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(Counsel for Respondent)
(By first class and certified mail)

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Dea Carpenter
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